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No. 88-1185

In the Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM S. WALTERS, JR.,
Petitioner,

vs.

FIRST TENNESSEE BANK
N.A. MEMPHIS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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February, 1989

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29 pp

QUESTIONS PRESENTED FOR REVIEW

Respondent does not agree with the Petitioner's statement of the questions presented, and submits that this Petition requires the Court's consideration of the following questions:

1. Whether Petitioner may raise issues before this Court by Petition for Writ of Certiorari, filed more than 90 days after entry of the judgment of the United States Court of Appeals for the Sixth Circuit, where a Petition to Rehear was filed with regard to only one of three cases consolidated for trial, but where belated review is sought of issues involved in the two cases which were not the subject of a Petition to Rehear.

2. If Question No. 1 is answered in the affirmative, whether the constitutionality of Pub. L. No. 96-221 and Pub. L. No. 96-399 (codified at 12 U.S.C. §86a), as amended, is a proper subject for review by this Court when challenged as giving rise to an unlawful impairment of contract, where the statutes have expired and the contract itself incorporated by reference applicable usury laws as they may exist "from time to time".

3. If Question No. 1 is answered in the affirmative, whether the United States Court of Appeals for the Sixth Circuit was correct in ruling that there is no violation of 12 U.S.C. §86 where no evidence exists in the record to support a finding that excess interest was "knowingly" charged to a borrower.

4. If Question No. 1 is answered in the affirmative, whether the Courts below were correct in holding that there was no evidence in the record in this case to support a finding of usury.

5. Whether the United States Court of Appeals for the Sixth Circuit was correct in holding that there is no violation of the federal mail fraud statute, 18 U.S.C. §1341, absent any proof of fraud or deception.

DISCLOSURE OF CORPORATE AFFILIATIONS PURSUANT TO SUPREME COURT RULE 28.1

Pursuant to Supreme Court Rule 28.1, Respondent, First Tennessee Bank National Association (formerly First Tennessee Bank N.A. Memphis) states that it is a wholly owned subsidiary of a publicly owned corporation, First Tennessee National Corporation and that First Tennessee National Corporation is the only publicly owned corporation not a party to this proceeding that has a financial interest in the outcome.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, First Tennessee Bank National Association (formerly First Tennessee Bank N.A. Memphis), hereby responds to and opposes the issuance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, review of which is sought by Petitioner, is reported at 855 F.2d 267 (6th Cir. 1988). It

is also reproduced in Petitioner's Appendix at A-1. Petitioner's Petition to Rehear in Court of Appeals Case No. 86-6031 is reproduced in Petitioner's Appendix A-86. The Order of the United States Court of Appeals, Sixth Circuit (filed October 14, 1988) denying Petitioner's Petition to Rehear is reprinted in Petitioner's Appendix at A-59, although it is erroneously reported by Petitioner to have been filed on October 14, 1986. The original opinion of the United States District Court for the Western District of Tennessee, Western Division, styled "Ruling on Post-Trial Arguments and Motions", which initially disposed of Petitioner's claims, is reprinted in Petitioner's Appendix at A-32. [Petitioner's Appendix is hereinafter abbreviated as "Pet. App." Respondent's Appendix is abbreviated as "Resp. App." References to the record are denoted herein by the abbreviation "R." The transcript of the trial is indicated by the abbreviation "Tr."]

CONSTITUTIONAL PROVISIONS AND STATUTES

Pursuant to Supreme Court Rule 34.2 Respondent states that the constitutional provisions and statutes relevant to this Petition are set forth in the Petition for Writ of Certiorari and in the Petitioner's Appendix, with the exception of the following:

1. Tenn. Code Ann. §47-14-102 (1979): (See Resp. App.)
2. Tenn. Code Ann. §47-14-103 (1979): (See Resp. App.)

COUNTER-STATEMENT OF THE CASE

Because Petitioner does not clearly set forth the factual background of this case, and because an understanding of the procedural history is important to an understanding of why the Petition should be denied, this Counter-Statement of the Case is provided by Respondent.

Three cases were consolidated for trial and all were appealed to the United States Court of Appeals for the Sixth Circuit. However, because only *one* of the three consolidated cases was made the subject of a Petition for Rehearing in the Court of Appeals, it is respectfully submitted that the issues raised by Petitioner relative to his usury claim have not been preserved by his filing of the Petition for a Writ of Certiorari. The remaining issue, which Petitioner contends involves the question of the type of intent to defraud required under the mail fraud statute, 18 U.S.C. §1341, was the one issue raised in a case which was made the subject of a timely Petition to Rehear, but should not be reviewed by this Court for the independent reasons hereinafter set forth.

Because no Petition to Rehear was filed with regard to the cases in which the usury issues were raised, no timely Petition for Writ of Certiorari to this Court has preserved the issues in those separate cases. In order properly to apprise the Court of the issues involved in the consolidated cases and the issues remaining in the one case over which this Court has jurisdiction, the following statement of the case is offered.

Three consolidated cases were tried in the United States District Court for the Western District of Tennessee, Western Division commencing on August 26, 1985, before the Honorable Robert M. McRae, Jr., Chief Dis-

trict Judge, sitting with a jury. The trial lasted approximately two (2) weeks.

The first of the three cases, and the only one which is properly the subject of this Petition, was filed on May 28, 1982 by William S. Walters, Jr. ("Petitioner") against First Tennessee Bank N.A. Memphis ("Respondent") claiming, in essence, that Respondent charged Petitioner more interest than he agreed to pay under the terms of a $475,000 promissory note (Counts I and III). That case bore Case No. 82-2391 in the trial court and was assigned Case No. 86-6031 in the United States Court of Appeals for the Sixth Circuit. Petitioner's theory was that Respondent had an "announced" prime rate and a different and secret "true" prime rate; thus Petitioner alleges "prime rate fraud." The Complaint also alleged misrepresentation (Count II), breach of confidential relationship (Count IV), violations by Respondent of various provisions of 18 U.S.C. §1961, *et seq.* ("RICO") (Count V), and usury (Count VI). When the Complaint was amended, the usury count was dropped. (R. 9, Amended Complaint) Respondent filed an answer denying liability, raising affirmative defenses, and counterclaiming with regard to the unpaid balance of the promissory note. At the close of all proof the trial court directed a verdict in favor of Respondent on all claims asserted by Petitioner in his Complaint, as amended. [Tr. pp. 1724-1745 and p. 1778, ll. 2-7]

The trial court also directed verdicts in favor of Respondent as to all similar counts remaining in a shareholder derivative complaint which involved two promissory notes in the amounts of $1,341,000 and $376,000, executed on behalf of a corporation partially owned by Petitioner and known as Ten Tex Marine, Inc. ("Ten Tex"). This suit had been filed by Petitioner on behalf

of himself and the other shareholder of Ten Tex (but without the other shareholder's approval) under Case No. 82-2869 in the trial court. This case was assigned Case No. 86-6033 in the Court of Appeals. The counts in that Complaint which were disposed of by the directed verdict included breach of contract (Counts I and VII), RICO (Counts II, III & IV), fraud (Count V), and misrepresentation (Count VI). [Tr. pp. 1724-1745, and p. 1778] The usury counts in the derivative action had previously been dismissed on September 20, 1984 on Respondent's Motion for Summary Judgment. This derivative suit was not brought before this Court by the Petition for Writ of Certiorari.

The remaining action, filed on October 19, 1982, was initiated by Fischer Lime and Cement Company, Inc. ("Fischer") against Petitioner and Respondent. In connection with the $475,000 loan to Petitioner, Respondent had taken from Petitioner, as collateral, an assignment of a promissory note from Fischer to Petitioner (the "Fischer note"). After Petitioner defaulted on his obligation, and in accordance with the security agreements, proceeds from the Fischer Note were applied by Respondent to Petitioner's outstanding interest on the defaulted loan. This action in the nature of an interpleader was instituted when the stakeholder, Fischer, was "notified" by counsel for Petitioner that it should cease making monthly payments on the Fischer Note to Respondent. After the commencement of the interpleader action, Fischer Note payments were deposited into the registry of the trial court. The only issue from that case which was appealed to the Sixth Circuit Court of Appeals was one portion of an issue raised by Petitioner in filing a cross-claim against Respondent in the interpleader action on November 23, 1982 alleging usury. As to this count, on

August 9, 1985 the trial court had ruled prior to trial that the statute of limitations barred any cause of action for alleged usury occurring prior to May 22, 1980. Petitioner does not complain concerning that ruling and did not appeal that portion of the trial court's ruling to the Court of Appeals for the Sixth Circuit.

As to the allegations of usury in that third action which were *not* held to be barred by the statute of limitations, the trial court granted a directed verdict in favor of Respondent with regard to those claims for collections allegedly occurring from October 8, 1980 through June 30, 1981, based upon a construction of state and federal interest rate statutes. The only issue related to the usury allegations which survived Respondent's motions was an allegation in connection with interest charges on two specific instances covering 32 days from May 29, 1980 through June 8, 1980 and from September 8, 1980 through September 25, 1980. The total of allegedly "excess" interest charged on the $475,000 loan during this period was $337.06. With regard to those alleged overcharges, Respondent's witness testified that the incorrect charges were inadvertent, and that they arose because of a clerical error in failing to adjust manually the interest rate ceiling on Petitioner's notes on its computer on the precise date the federal discount rate changed. The testimony established that those adjustments had to be made manually, and that the same clerical errors resulted in undercharges favorable to Petitioner, as well as overcharges, and that the cumulative amount of undercharges always exceeded the amount of any overcharges. Although no contrary testimony or evidence was presented, the trial court submitted an issue to the jury by means of the following special interrogatory:

> Did the defendant First Tennessee Bank knowingly take or receive from or charge to the plaintiff William S. Walters, Jr. interest in excess of the lawful rate on the $475,000 note signed May 3, 1979, between the date of its signing and December 2, 1980?

The jury answered the interrogatory, which was the only issue addressed to them, by responding, "Yes."

Because there were numerous questions of law which might affect the ultimate judgment, the court directed counsel for the parties to prepare proposed judgments, and heard arguments on the respective positions of the parties. On June 5, 1986 the trial court entered its Rulings on Post-Trial Arguments and Motions. (Pet. App. 32) The trial court found that there was no evidence from which the jury could conclude that the collection of allegedly excess interest was "knowingly done." The Court's ruling contains a lengthy and comprehensive discussion of both the legal and factual justifications for its conclusion. In explaining its reasons for so holding, the trial court observed in part that:

> The plaintiff must prove that the taking of excess interest was 'knowingly done.' The Plaintiff has offered no direct or sufficient circumstantial proof on the issue of 'knowingly done.'
>
> . . .
>
> Although counsel for Mr. Walters attempted to impeach Mr. Dudley's testimony by suggesting in his questions that the overcharges were or may have been intentional, he produced no witness to testify on this point and presented no other evidence which would tend to prove this intent. (Pet. App. 40-41)

On appeal, this case was assigned case number 86-6032 in the Sixth Circuit Court of Appeals.

All three cases were separately appealed to the United States Court of Appeals for the Sixth Circuit and the trial court was affirmed in all three cases in a consolidated opinion. (Pet. App. 1) Petitioner filed a Petition to rehear only in Case No. 86-6031. (Pet. App. 86) As noted above, this was an appeal from Case No. 82-2391 below, and as listed by counsel for Petitioner in his Civil Pre-Argument Statement, the single issue presented for review in that case was:

> In order for a corporate defendant to be liable for engaging in a mail fraud, is it necessary that the corporate offices responsible for the conduct proven have engaged in the conduct intending to do something wrong?

In view of the fact that the opinion of the United States Court of Appeals for the Sixth Circuit disposing of all issues raised in the three cases was filed on August 16, 1988, and since a Petition to Rehear was filed in only one of the three cases (86-6031) it is respectfully submitted that this Petition for Writ of Certiorari is timely only with regard to that one case, since the time for filing the Petition for Writ of Certiorari pursuant to Supreme Court Rule 20.4 was extended by the Petition to Rehear only in Case No. 86-6031.

Without regard to the untimeliness of the Petition with regard to all issues other than the issues raised concerning the mail fraud statute, 18 U.S.C. §1341, all issues will be addressed below in order to point to additional compelling reasons why these are not proper cases for review by this Court.

SUMMARY OF ARGUMENT

The questions which Petitioner claims have been raised by his Petition for Writ of Certiorari are not proper questions for consideration by the Court. None of the considerations governing review set forth in Supreme Court Rule 17.1 exist in this case.

As a jurisdictional matter, only the issue denominated as Question 7 in the Petition is properly before the Court because the Petition is not timely with regard to the other issues, which were issues raised in separate cases which were not made the subject of timely Petitions to Rehear.

In addition to the jurisdictional defect, Question 1 presented in the Petition is not a proper subject for review because it challenges the constitutionality of interest rate relief statutes which have expired and therefore do not merit review by the Court. Petitioner simply seeks an advisory opinion on this issue, asking the Court to "inform" Congress so that it will act properly "the next time it faces the necessity to address an interest rate crisis." (Pet. p. 15) Moreover, the constitutional challenge is based upon an alleged impairment of contract yet the courts below made factual findings to the effect that the contract in question, i.e., the promissory note, clearly anticipated by the use of certain language in the note floating interest rates based upon changes which might occur in the law. Therefore, from a factual standpoint, there has been no contractual impairment.

The several Questions purportedly raising the issues of the requisite intent required under the usury statute and the mail fraud statutes are not proper subjects for

review because the courts below found a *total* absence of proof of intent with regard to either of these allegations.

The Petition does not present any issue involving conflict between an opinion of the Court of Appeals for the Sixth Circuit and the decisions of another federal court of appeals on the same matter; nor has the Court of Appeals so far departed from the accepted and usual course of judicial proceedings, nor so far sanctioned such a departure by the District Court, as to call for the exercise of this Court's power of supervision.

ARGUMENT

The Petition For Writ Of Certiorari Is Not Timely And The Court Has No Jurisdiction To Review The Usury Issues Described In The Petition

Supreme Court Rule 20.4 provides that: ". . . [I]f a petition for rehearing is timely filed by any party in the case, the time for filing the petition for writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or of the entry of a subsequent judgment entered on the rehearing." However, no provision of the Rules tolls the time for filing a petition for writ of certiorari in separate but consolidated cases where a petition for rehearing is filed in only one of the several cases which were consolidated for trial, but which were appealed separately to the Court of Appeals and assigned separate case numbers.

Since a petition to rehear was not filed in Case No. 86-6032 nor in Case No. 86-6033, the 90 day period for filing a petition for writ of certiorari in those cases

expired on or about November 14, 1988. The usury issues attempted to be raised by Petitioner in this Petition for Writ of Certiorari were not encompassed within Case No. 86-6031, the only case in which a petition to rehear was filed.

28 U.S.C. §2101(c) establishes the time for invoking this Court's jurisdiction in civil cases. Where, as here, the time for filing a petition for writ of certiorari is established by Congress, the timely filing of the petition is a requisite to the Court's jurisdiction. *Schacht v. United States,* 398 U.S. 58, 65, 90 S.Ct. 1555, 26 L.Ed.2d 44 (1970); *Matton Steamboat Co., Inc. v. Murphy,* 319 U.S. 412, 63 S.Ct. 1126, 87 L.Ed. 1483 (1943); *Department of Banking v. Pink,* 317 U.S. 264, 63 S.Ct. 233, 87 L.Ed. 254 (1942); *Citizens' Bank v. Opperman,* 249 U.S. 448, 39 S.Ct. 330, 63 L.Ed. 701 (1919). It is respectfully submitted that this Court has no jurisdiction to review the usury issues raised by Petitioner.

While disagreeing that the usury related questions are properly before the Court from a jurisdictional standpoint, the following responses are given with regard to all issues which Petitioner attempts to raise in his Petition for Writ of Certiorari.

The Trial Court And The Court Of Appeals Were Correct In Holding That Under Applicable Law, Including The Surcharge Amendments to 12 U.S.C. §85 And §86, Respondent's Charges On The $475,000 Note Were Proper

In Questions 1, 2 and 6 raised in the Petition, Petitioner argues that in executing a promissory note on May 3, 1979, even though that note provided for a floating rate of interest, Petitioner was receiving a contractual

guarantee that he would never be charged more interest than the maximum rate chargeable on the date of signing. Based upon that assumption, Petitioner then seems to argue that federal preemption legislation which granted interest rate relief during and after 1980, if applied to Petitioner's note, would constitute an unconstitutional impairment of this assumed "contract".

Petitioner candidly observes that the legislation being questioned has expired (Pet. p. 13), and is no longer in existence. While this fact argues forcefully against review by this Court, Petitioner still seeks what is essentially an advisory opinion citing what he calls the general public's entitlement "to have Congress rightly informed by this Court." (Pet. p. 15) Respondent submits that it is well settled that where the issue sought to be reviewed concerns a statute that has been repealed, the issue does not merit consideration by this Court. *District of Columbia v. Sweeney*, 310 U.S. 631, 60 S.Ct. 1082, 84 L.Ed. 1402 (1940). Likewise, where the enactment of a statute subsequent to the commencement of litigation confines the impact of an alleged violation to the case at bar, certiorari should not be granted. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 76-77, 75 S.Ct. 614, 99 L.Ed. 897 (1955). Here, Petitioner admits not only that the questioned statute has expired, but he also admits that "statutes of limitation have run on any similar claims which, perhaps, could have been made in years past." (Pet. p. 15) Therefore, this is not a compelling case for review by this Court, and mere advisory opinions or opinions based upon hypothetical facts should not be rendered by the Court. *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617 (1937).

In examining the merits of Petitioner's claims, it must be noted that the interest preemption statutes referenced by Petitioner have never been declared unconstitutional by any Court. More importantly, those statutes could not constitute an impairment of Petitioner's contract because the contract embodied in the $475,000 promissory note obviously anticipated, because of its floating rate of interest, that it might in the future exceed the rate which was the maximum legal rate on the date of signing. This recognition is evidenced by the following language in the note [Tr. Ex. 3]:

> The rate of interest on the unpaid principal balances of the indebtedness hereby evidenced shall be adjusted as of each day that the prime rate is changed; provided, always, however, that notwithstanding any changes in said prime rate, the rate of interest hereon prior to maturity shall never be more than the maximum lawful contract rate which a national bank, having its principal place of business in the State of Tennessee, may lawfully charge *from time to time.*
>
> . . .
>
> It is the intention of the Maker and the Bank to contract in strict compliance with the usury laws as set forth at 12 U.S.C. §85, and the laws of the State of Tennessee incorporated therein by reference; and, accordingly, in no event and upon no contingency shall the Bank ever be entitled to receive, collect, or apply as interest any interests, fees, other payment equivalent to interest, in excess of the maximum contract rate which may, *from time to time*, be lawfully charged to the Maker hereof *under the applicable law by a national bank* having its principal place of business in the State of Tennessee . . . . (Emphasis supplied.)

Clearly, the parties contemplated that the maximum rate allowed under the law would fluctuate with time, thus the language "from time to time" throughout the note. The Court of Appeals clearly made this factual finding. (Pet. App. 21) If it had been the intention of the parties to simply provide an absolute 18% ceiling, that would have been simple enough to insert; and it is respectfully submitted that the absence of that language, together with the inclusion of the language quoted above, makes the construction urged by Petitioner illogical.

In his Question 6, Petitioner raises the issue of whether the trial court correctly ruled that Respondent was entitled to the benefit of the preemptive "surcharge" statutes in the case of this note. (Pub. L. No. 96-221 and Pub. L. No. 96-399) Petitioner, however, did not brief that issue at the Court of Appeals, choosing instead to attempt to incorporate by reference a brief filed with the trial court.

In rejecting Petitioner's argument as to the operation of these statutes the Sixth Circuit Court of Appeals observed:

> Walters superficially challenges the district court's construction of Pub. L. No. 96-221 and Pub. L. No. 96-399 in its appellate brief by simply referencing its trial memorandum. We cannot countenance this attempt to circumvent Fed. R. App. P. 28(g) and its limitation on appellants' briefs to 50 pages. (Pet. App. p. 21, n. 5)

Because the issue was not properly raised before the Court of Appeals, this Court should not review the issue. However, Respondent disagrees that it misinterpreted the applicable statutes and amendments and submits that the

trial court correctly adopted Respondent's position, which is set forth below.

The $475,000 loan was made and the note was signed on May 3, 1979. The usury law on which Respondent relied at that time and until December 2, 1980, was the Tennessee usury law. (Tenn. Code Ann. §§47-14-102 & 103) Respondent complied with that law.

Respondent, as a national bank, was entitled to rely on the Tennessee usury law during the period May 3, 1979 to December 2, 1980 by virtue of 12 U.S.C. §85, which allows a national bank to charge the greater of (i) the rate permitted by state law or (ii) 1% over the Federal Reserve discount rate in effect in the reserve district in which Respondent is located.

Tennessee law permitted an interest rate of 5% over the discount rate of the Federal Reserve Bank in Atlanta, with a maximum of 18%. Except for the two inadvertent errors testified to by Mr. Charles B. Dudley, III, and discussed later in this brief, which did not occur during the period of the Federal Reserve surcharge, during the period when Respondent relied on Tennessee law, it *never exceeded the rate permitted by state law.* This fact is not disputed by Petitioner.

On April 1, 1980, at a time when Respondent was relying on state law and the rate charged Petitioner was within the state law ceiling, Congress adopted Pub. L. No. 96-221.

Pub. L. No. 96-221 [codified at 12 U.S.C. §86a] amended 12 U.S.C. §85 to:

> (a) Preempt any state law, whether statutory or constitutional, to the extent state law imposed a rate ceiling lower than Pub. L. No. 96-221 imposed;

(b) Permit national banks to charge (on loans of the type to Plaintiff) up to "5% in excess of the discount rate, *including any surcharge thereon,* . . . in effect at the Federal Reserve Bank in the Federal Reserve District where the person is located";

(c) Apply only with respect to business . . . loans in amounts of $25,000 or more made in any state during the period beginning on April 1, 1980, and ending on the earlier of -

(1) April 1, 1983; or

(2) [The date such state expressly opts out of the effect of Pub. L. No. 96-221 (which Tennessee never did)]

(d) Provide that where the amendments in paragraphs (a), (b) and (c) above and "any other provision of law . . . apply with respect to the same loan . . . such loan . . . may be made at the highest applicable rate"; and

(e) Repeal as of March 31, 1980, Pub. L. No. 96-104 and parts of Pub. L. No. 96-161 [neither of which were relied on by Respondent for Petitioner's loan].

When enacted, Pub. L. No. 96-221 by its express terms did not apply to Petitioner's loan because the loan was not made "during the period beginning April 1, 1980 and ending April 1, 1983." At that time (April 1980), Respondent continued to rely on Tennessee law and its rate was within the Tennessee ceiling.

Pub. L. No. 96-221 nonetheless becomes important to this issue because Pub. L. No. 96-399 on October 8, 1980 amended Pub. L. No. 96-221 to *add* a provision that permitted Pub. L. No. 96-221 (with its provision for a sur-

charge) to apply to Petitioner's loan by adding to Pub. L. No. 96-221 the following language:

> (b) A loan shall be deemed to be made during the period described in subsection (a) [April 1, 1980 to April 1, 1983] if such loan -
>
> * * *
>
> (B) was made *prior to* or on April 1, 1980, and bears or provides for interest during such period on the outstanding amount thereof at a variable or fluctuating rate. (Emphasis added.)

Pub. L. No. 96-399 further provided:

> (2) The amendments made by paragraph (1) [those amendments discussed above] take effect on April 1, 1980.

Pub. L. No. 96-399 thus made Pub. L. No. 96-221 applicable to Petitioner's loan because that loan was "made prior to April 1, 1980, and [bore] interest during such period on the outstanding amount thereof at a variable or fluctuating rate . . . ."

At the time Pub. L. No. 96-399 was adopted, Respondent was continuing to rely on Tennessee law for the rate ceiling. It was not until December 2, 1980 that Respondent first relied on federal law for the applicable interest rate ceiling. At that time, Pub. L. No. 96-221 as supplemented by Pub. L. No. 96-399:

> (a) Preempted any state usury law, whether statutory or constitutional, to the extent state law imposed a rate ceiling lower than Pub. L. No. 96-221 imposed.
>
> (b) Permitted national banks to charge (on loans of the type to Petitioner) up to "5% in excess of

the discount rate, *including any surcharge thereon,* . . . in effect at the Federal Reserve bank in the Federal Reserve district where the person is located."

(c) Applied to loans made between April 1, 1980 and April 1, 1983 and to loans made *prior to* April 1, 1980 which provided for interest during such period on the outstanding balance thereof at a variable or fluctuating rate; and

(d) Provided that where the amendments in paragraph (a), (b) and (c) above and "any other provision of law . . . apply with respect to the same loan . . . such loan may be made at the highest applicable rate." (Emphasis added.)

12 U.S.C. §86a, as amended by Pub. L. No. 96-211 and Pub. L. No. 96-399, thus applied to the May 3, 1979 loan. It is on that statute that Respondent justifiably relied after December 2, 1980 and consequently, the application of the surcharge to the federal discount rate does not constitute usury.

Petitioner contended at trial that reliance by Respondent on 12 U.S.C. §86a was incorrect. Although he does not address the issue in his brief, the trial brief which he attempted to incorporate by reference claims an earlier amendment to 12 U.S.C. §86a, i.e., Pub. L. No. 96-161, exempted Tennessee from the preemptive federal usury legislation until July 1, 1981. This is an incorrect reading of the statute.

Pub. L. No. 96-161 permitted national banks to charge 5% over the discount rate of the Federal Reserve Bank in the district where the bank is located on business loans in excess of $25,000. It did not provide a surcharge. The amendment was effective from December 28, 1979

and *expired* on the earliest of (1) July 1, 1980 (in states where there was a statutory usury provision); or (2) July 1, 1981 (in states where there was a constitutional usury provision); or (3) the date when the state specifically and by reference rejected the federal usury law. As stated earlier, Respondent never relied on this statute, as the loan in question was made prior to its effective date.

It is evidently Petitioner's position that in states with a constitutional provision regarding usury the federal enactments did not become *effective until* July 1, 1981.

Petitioner reaches this conclusion on the wording of §213 to Pub. L. No. 96-161, which reads as follows:

> Notwithstanding any other provision of this title, subject to Sections 207(2) and (3) [the opt out provisions], the provisions of *this title* shall continue to apply *until July 1, 1981,* in the case of any state having a constitutional provision regarding maximum interest rates. (Emphasis added.)

It is clear that this provision gives the *expiration* date of the amendment, and not its *effective* date. Only by interpreting the emphasized phrase "this title" in the above quoted portion of §213 to mean all of 12 U.S.C. §85 and 12 U.S.C. §86 does Petitioner's argument logically proceed to the conclusion urged by him. Apparently, Petitioner reads §213 to mean that the provisions of 12 U.S.C. §85 (Petitioner's interpretation of the meaning of "this title") as they existed *prior to* the amendments contained in Pub. L. No. 96-161 would continue in effect until July 1, 1981 in those states having a constitutional provision regarding maximum interest rates. Under Petitioner's interpretation, the preemptive provi-

sions of Pub. L. No. 96-161 become effective in those states having constitutional usury provisions *beginning* July 1, 1981. This interpretation leads to a curious result in that Pub. L. No. 96-161 *ceases* to be effective in those states having *statutory* usury provisions on July 1, 1980, a full year *before* they would become effective in states having constitutional usury provisions. Obviously such an interpretation makes no sense and must be deemed to be without merit.

Petitioner's argument on this issue and any refutation of it is unnecessary because Respondent never relied on Pub. L. No. 96-161, as that enactment in no way applied to the Petitioner's loan. The effective date of Pub. L. No. 96-161 was December 28, 1979 and Petitioner's loan was made on May 3, 1979. There is nothing in Pub. L. No. 96-161, unlike Pub. L. No. 96-221, as amended by Pub. L. No. 96-399, that permits retroactive application. In the absence of applicable federal legislation during that period, Respondent continued to operate under state usury law. The proof showed that during the period that Respondent was operating under state law, it never exceeded the 18% ceiling (except for the two inadvertent errors testified to by Mr. Dudley and addressed later in this brief).

The first of the federal usury laws that applied to Respondent and to Petitioner's loan is found in Pub. L. No. 96-221 as amended by Pub. L. No. 96-399, codified at 12 U.S.C. §86a. By its terms, this enactment, effective April 1, 1980, *repealed Pub. L. No. 96-161,* and preempted any state law, whether statutory or constitutional, that would prohibit the charging of a rate equal to 5% over the discount rate of the Federal Reserve Bank, *including any surcharge.* The amendments found in Pub.

L. No. 96-399, enacted October 8, 1980, made that rate applicable to variable rate loans made prior to April 1, 1980. Respondent correctly relied on this statute, as amended, because that statute preempted state law, and because it applied to the Petitioner's loan, which was a variable loan made before April 1, 1980. The rates charged Petitioner from December 2, 1980 to November 16, 1981, although over the 18% usury ceiling of Tennessee, were not usurious because state law had been effectively preempted by the federal statute that allowed the higher rate. Simply stated, Respondent made no mistake of law in the rates it charged Petitioner.

The Trial Court And The Court Of Appeals Were Correct In Holding That There Is No Evidence In The Record To Support Petitioner's Claim of Usury

Petitioner's claim that Respondent collected some "$25,000" in excess interest is based upon his incorrect reading of the surcharge amendments to the federal usury statutes as explained above. The only other usury allegations discussed in the Petition relate to the issue of whether the charging of $337.06 in allegedly "excess" interest on the $475,000 promissory note was *"knowingly done"* as required to subject Respondent to the forfeiture and penalty provisions of 12 U.S.C. §86. That issue is addressed in Petitioner's Questions 3, 4 and 5 of his Petition for Writ of Certiorari. Both the trial court and the Court of Appeals held that Petitioner simply failed to carry his burden of proof on that issue. The focus of the inquiry by the Court of Appeals in addressing this issue was whether there was *any* evidence that the overcharges were made "knowingly" (Pet. App. 23) since Respondent admitted that the interest charges occurred.

The Petitioner has the burden of meeting the statutory test; a plaintiff must prove that the taking of excess interest was "knowingly done." The Petitioner offered no proof on the issue of "knowingly done." (Pet. App. 40) The *only* testimony at the trial concerning this issue came from Respondent's witness, Charles B. Dudley, III, who testified that Respondent *inadvertently* and *mistakenly* charged Petitioner in excess of the amount allowed by the federal discount rate plus five percentage points on two occasions (May 29, 1980 through June 8, 1980 and September 8, 1980 through September 25, 1980). Mr. Dudley testified that in each of those two instances the overcharge resulted from an inadvertent oversight in a clerk's failure to lower Respondent's usury ceiling on the computer with regard to Petitioner's notes when the federal discount rate (and therefore the usury ceiling) dropped. Mr. Dudley testified that Respondent was undergoing a conversion in its computer systems which made it impossible to add enhancements to the existing system. Therefore it was necessary at the relevant times manually to input the changes in the usury ceiling with regard to each variable rate note. On these two occasions there was simply a failure to reduce the interest ceiling on the computer with regard to Petitioner's note. [Tr. Dudley, pp. 1341-1355 & Ex. 77 & 78]

Mr. Dudley testified that the usury ceiling or the prime rate changed approximately one hundred times during the period covered by this lending transaction. [Tr. Dudley, p. 1340] He also testified that on three occasions Respondent *undercharged* Petitioner due to the same type of inadvertent clerical errors in setting the rate on the computer that caused the "overcharges." [Tr. Dudley, pp. 1341-1355 & Ex. 77 & 78] Mr. Dudley's un-

contradicted testimony established that these undercharges *preceded and exceeded* the amount of the overcharges, so that at all times Respondent on a cumulative basis, charged Petitioner *less* than allowed by law and the terms of the note. [*Id.*]

There was absolutely no contradictory testimony from Petitioner or from any other witness during the trial on the issue of the inadvertent errors that resulted in the so-called "overcharges." Although counsel for Petitioner attempted to impeach Mr. Dudley's testimony by suggesting in his questions that the overcharges were or may have been intentional, he produced no witness to testify on this point and presented no other evidence which would tend to prove any such intent, or to contradict or impeach Mr. Dudley. (Pet. App. 41-42) Mr. Dudley's trial testimony, his deposition testimony and his Affidavit in this case all reflect that the "overcharges" were unintentional and inadvertent. Petitioner is not entitled to a *presumption* of usury since the burden of proof is on the plaintiff.

There is affirmative proof in the record showing absence of intent (undercharges), and in light of the harsh penalties for usury and the small amount of the overcharges ($337.06), it is illogical to presume an intent to exact excess interest on this note. Both the trial court and the Court of Appeals so found.

It has been consistently held by courts considering the issue of usurious intent that inadvertent errors in bookkeeping or mathematical computations, when not mistakes of law, are insufficient to show intent. *Ford Motor Credit Corp. v. Catalani,* 238 Ark. 561, 383 S.W.2d 99 (1964); and *White v. Kaminsky,* 196 Tenn. 180, 264

S.W.2d 813, 815 (1954). *See also* cases collected at 11 A.L.R.3d §1498. In the instant case, there is no usurious intent evident on the face of the note which distinguishes it from typical usury cases. *See Mutual Protective Corp. v. Palatnick*, 118 Conn. 1, 169 A. 917 (1934). In view of the foregoing, the trial court and the Court of Appeals held that proof of the requisite intent under 12 U.S.C. §86 was lacking and for that reason there was no violation of the statute. Thus the trial court entered judgment for Respondent, notwithstanding the jury interrogatory. [(R. 51, Order on Motions for Summary Judgment, entered September 20, 1984, p. 7; R. 128, Ruling on Post-Trial Arguments and Motions)]

Based upon the absence of any proof at trial that the overcharges were made knowingly, the trial court should not have sent the issue to the jury and properly granted a judgment in favor of Respondent. The applicable case law provides that "the burden to plead and prove usury which does not appear on the face of an instrument rests on the party seeking to avoid the instrument." *Maestro Music, Inc. v. Rudolph Wurlitzer Co.*, 354 P.2d 266, 271 (Ariz. 1960); and *Murphy Finance Co. v. Fredricks*, 127 N.W.2d 924 (Neb. 1964). The burden of proof extends to proof of the element of intent. *Sumner v. Investment Mortgage Company of Florida*, 332 So.2d 103 (Fla. App. 1976).

As the Court of Appeals and the trial court held, there was an absence of proof of knowing conduct by the Respondent. This is an essential element of usury under 12 U.S.C. §86 which Petitioner had the burden of proving "convincingly". *Wheeler v. Union National Bank of Pittsburgh*, 96 U.S. 268, 270, 24 L.Ed. 833 (1878).

Petitioner Failed To Prove The Elements Of A Violation Of The Mail Fraud Statute (18 U.S.C. §1341)

Finally, in Question 7, Petitioner seeks review of the factual determination of both the trial court and the Court of Appeals that there had been no evidence presented from which the jury could conclude that there had been intent to defraud on behalf of Respondent as required to establish the "predicate act" under RICO i.e., a violation of the mail fraud statute, 18 U.S.C. §1341. While Petitioner attempts to frame this issue in terms of the need for a determination of the requisite level of intent to defraud required under the mail fraud statute, Respondent submits that this is not a proper case for review of that issue since both the trial court and the Court of Appeals in this case point to the complete absence of evidence of *any* type of intent to defraud, either passive or active. What Petitioner is actually seeking is a review by this Court of factual findings by the trial court and the Court of Appeals. This Court will not undertake such a review. *National Labor Relations Board v. Pittsburgh Steamship Co.*, 340 U.S. 498, 503, 71 S.Ct. 453, 95 L.Ed. 479 (1951). Petitioner cites to no support in the transcript and makes no reference to any testimony or proof whatsoever which he contends would support a finding that Respondent has committed mail fraud. There is no such proof.

Although Respondent contends that the courts below were correct in dismissing the RICO counts for a number of reasons, and although the trial court stated alternative grounds for its decision, clearly the lack of any proof in the record whatsoever as to the existence of mail fraud, and therefore the lack of a "predicate act" under RICO adequately supports the rulings below.

Petitioner seems to argue that actual fraud is not a necessary element of a violation of the mail fraud statute. In *Epstein v. United States,* 174 F.2d 754 (6th Cir. 1949), the Court of Appeals for the Sixth Circuit held that:

> In order to prove a scheme to defraud under the mail fraud statute, there must be proof of a scheme embracing *active or actual fraud.* A charge of using the mails to carry out a scheme to defraud cannot be maintained on proof of mere constructive fraud. (Emphasis supplied.)
>
> . . .
>
> Assuredly, we must consider fraud in mail fraud cases according to the standard of what fraud is in civil cases. That, however, is no qualification of the rule that to sustain a charge of using the mails to defraud, there must be proof of an *actual fraud* rather than a constructive fraud. (Emphasis supplied.)

174 F.2d at 766.

Although the element of knowing participation in a scheme to defraud may in appropriate cases be established circumstantially, it cannot be based on "constructive" knowledge. *Windsor v. United States,* 384 F.2d 535 (9th Cir. 1967).

Relying upon a holding of this Court, the Sixth Circuit has recently applied the ruling in *Epstein, supra* in the context of a violation of the mail fraud statute as a predicate act in a RICO case. *Bender v. Southland Corp.,* 749 F.2d 1205 (6th Cir. 1984). In that case the Court, upholding the dismissal of RICO counts in the action, stated as follows:

> We further hold that the district court properly dismissed the RICO claim in which the plaintiffs allege that Southland committed mail fraud. The crime of

mail fraud has two elements: a scheme or artifice to defraud and a mailing for the purpose of executing the scheme. *Pereira v. United States,* 347 U.S. 1, 8, 74 S.Ct. 358, 362, 98 L.Ed. 435 (1954); *United States v. Talbott,* 590 F.2d 192, 195 (6th Cir. 1978); *United States v. Schilling,* 561 F.2d 659, 661 (6th Cir. 1977). This court has held that the scheme to defraud must involve:

> [I]ntentional fraud, consisting in deception *intentionally* practiced to induce another to part with property or to surrender some legal right, and which accomplishes the end desired. [*A scheme to defraud*] *requires intent to deceive or defraud.* [Emphasis the Court's.]

Epstein v. United States, 174 F.2d 754, 756 (6th Cir. 1949). (Citations omitted.) This court has also held that the scheme to defraud must involve "misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension." *United States v. Van Dyke,* 605 F.2d 220, 225 (6th Cir.), *cert. denied,* 444 U.S. 994, 100 S.Ct. 529, 62 L. Ed.2d 425 (1979).

749 F.2d at 1215-1216.

Petitioner failed to introduce any evidence from which a jury could find a violation of 18 U.S.C. §1341. Furthermore, Petitioner failed to introduce any evidence of the underlying claim of a scheme of misrepresentation which it claimed as giving rise to its RICO count. [R. 128, Ruling on Post-Trial Arguments and Motions, Pet. App. p. 34] After two weeks of proof, fully considered by the trial court and the Court of Appeals, Petitioner now seeks to have this Court act as a fact finding body and second guess the courts below.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari does not present issues which warrant review by this Court. The Petition should therefore be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel of record hereby certifies that three copies of this Brief have been served upon all parties required to be served by United States Mail, postage prepaid, on the 9th day of February, 1989, including Mr. Larry E. Parrish, The Crescent Center, 6075 Poplar Avenue, Suite 400, Memphis, Tennessee 38119.

LEO M. BEARMAN

APPENDIX

Tenn. Code Ann. §47-14-102 (1979). Definitions.— The following terms shall have the following meanings, subject to additional definitions, specifications and limitations contained in provisions of other statutes relating to particular categories of lenders or of transactions:

(1) "Interest" is compensation for the use or detention of, or forbearance to collect, money over a period of time; and does not include compensation for other purposes, including, but not limited to, time-price differentials, loan charges, brokerage commissions, or commitment fees. For example, when you borrow money, you pay the lender simple interest (which is like rent) for the use of the money. The amount of interest you pay depends on:

(A) the principal, which is the amount you borrow;

(B) the rate, which is a percent based on a period of time, usually 1 year; and

(C) the number of periods of time that you have the use of the money.

Thus, interest equals principal X rate X time. Accordingly, to determine the interest charged for borrowing $500 for 3 years if the rate of interest is 9% per year, we first calculate the interest for 1 year using the proportion rate equal percent/base, or 9/100 equals I/500; where I stands for interest, interest equals 9 X 500/100 equals $45. For 3 years, the interest equals 3 X $45 equals $135; or you can combine steps 1 and 2 so that interest for 3 years equals (9% X $500) X 3 equals $135, presuming that no payment is made toward the principal of the loan during the three year period.

(2) "Effective rate of interest" is the simple rate of interest, i.e., the ratio between the interest payable on an obligation and the principal for a period of time, including the result of converting compound, discount, add-on, or other nominal rates of interest into simple rates of interest.

(3) "Formula rate" means an annual rate of interest five (5) percentage points above the rate for advances and discounts to member banks under §§ 13 and 13a of the Federal Reserve Act, as now or hereafter may be amended, in effect at the federal reserve bank of the federal reserve district which includes the largest geographical area of this state.

(4) "Applicable formula rate" means either:

(A) the "formula rate" in effect at any given time; or, at the election of the parties to the contract.

(B) the "formula rate" last published in the Tennessee Administrative Register prior to the date of the contract.

(5) "Actuarial method" means the method of allocating payments made on a debt between the principal and interest pursuant to which payment is applied first to accumulated interest and any remainder is subtracted from, or any deficiency is added to, the unpaid principal balance of the debt.

(6) "Usury" is the collection of interest in excess of the maximum amounts authorized by or pursuant to this chapter or any other statute.

(7) "Principal" is the total amount of an obligation to pay money on which interest is to be computed. With respect to loans:

(A) principal is the total amount of money paid to, receivable by, credited to the account of, or payable for the account of, a borrower;

(B) loan charges and other charges for which the borrower contracts to pay may be included as principal, subject to such limitations as may be imposed by statute;

(C) precomputed interest may not be included as principal for the purpose of determining the simple or the effective rate of interest.

(8) "Loan charges" are compensation to the lender for services or expenses directly incident to a loan or contract to make a loan; and do not include compensation for other purposes, including, but not limited to, time-price differentials, interest, brokerage commissions, or commitment fees.

(9) "Time-price differential" is the difference, however denominated or expressed, between the amount charged on a sale of property, or a charge for services, for cash and the amount charged if payment were to be deferred or if payment were to be made in future installments; provided, however, that any difference in such amounts charged with respect to the sale of real property to be owned and occupied by the purchaser as his principal place of residence for family residential purposes shall be considered to be interest rather than time-price diferential.

(10) "Commitment fees" are compensation to the lender in return for its conditional or unconditional obligation during a certain period of time to make a loan or loans under specified terms and conditions.

(11) "Brokerage commissions" shall include all fees paid to mortgage bankers, banks, savings and loan associations, savings banks, or other parties regularly engaged in the business of originating and arranging for the placement of loans secured by mortgages or deeds of trust upon real estate for services performed in the origination and placement of such loans with third party lenders, whether the same be closed directly in the name of the lender or, in the alternative, in the name of such mortgage banker or other party with the intention to sell and transfer the same to such lender, provided that such sale or a substantial portion thereof is completed within one (1) year from the closing of such loan or the completion of construction, whichever is later. [Acts 1979, ch. 203, § 1.]

Tenn. Code Ann. §47-14-103 (1979). Maximum effective rates of interest.—Except as otherwise expressly provided by this chapter or by other statutes, the maximum effective rates of interest shall be as follows:

(1) For all transactions in which provisions of other statutes fix a maximum effective rate of interest for particular categories of creditors, lenders, or transactions, the rate so fixed;

(2) For all written contracts, signed by the party to be charged, and not subject to subdivision (1) of this section, the applicable formula rate; provided, however, that in no event shall the applicable formula rate exceed eighteen percent (18%) per annum; and

(3) For all other transactions, ten percent (10%) per annum. [Acts 1979, ch. 203, § 2.]